United States Department of Labor
Employees' Compensation Appeals Board

W.D., Appellant	)	
and	)	**Docket No. 15-1297**
	)	**Issued: August 23, 2016**
DEPARTMENT OF THE ARMY, ARMY MEDICAL COMMAND, Fort Leonard Wood, MO, Employer	)	

Appearances:
Debra Hauser, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 21, 2015 appellant, through counsel, filed a timely appeal from a March 13, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits and schedule award eligibility effective May 31, 2014 pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

OWCP accepted that on August 9, 2005 appellant, then a 41-year-old paramedic, sustained a lumbar sprain and a recurrent herniated L5-S1 disc[3] with myelopathy when he prevented a patient from falling off a collapsing ambulance gurney. Appellant did not return to work following the injury. He remained under medical treatment. After using leave, appellant received wage-loss compensation beginning on June 29, 2006.

On May 9, 2008 Dr. W. Blake Rodgers, an attending Board-certified orthopedic surgeon, performed an L5-S1 decompression, L5-S1 discectomy, partial vertebrectomies at L5 and S1, and reconstruction and fusion from L5 to the sacrum using bone allograft and a fixation device. OWCP authorized the procedures. Appellant's case was placed on the periodic rolls effective June 8, 2008.[4]

Dr. Peter M. Klara, a Board-certified neurosurgeon, performed a revision surgery on January 30, 2009, with removal of right-sided pedicle instrumentation, decompressive L5-S1 laminectomies, left-sided interbody fusion, fixation rod and screw implants, and bone allograft. OWCP authorized the procedures. As the surgeries did not alleviate appellant's symptoms, he underwent implantation of a permanent spinal cord stimulator on October 19, 2010, approved by OWCP.

On April 25, 2011 OWCP obtained a second opinion from Dr. Michael Clarke, a Board-certified orthopedic surgeon, who opined that appellant could perform modified sedentary work for "perhaps four hours a day." A June 21, 2011 functional capacity evaluation indicated a sedentary work capacity.

[3] Appellant underwent bilateral L5-S1 laminectomies and discectomies on April 17, 2011. He had a history of two rotator cuff surgeries, with residual bursitis on the left demonstrated by November 29, 2006 imaging studies. Appellant also had a history of left eye surgeries, a ventricular septal defect, and supraventricular tachycardia.

[4] On July 23, 2008 the employing establishment offered appellant a job as an accounting technician. Appellant declined the offer on August 4, 2008. By decision dated October 27, 2008, OWCP terminated his wage-loss compensation benefits and schedule award eligibility effective that day under 5 U.S.C. § 8106(c)(2), finding that he refused an offer of suitable work. It affirmed the termination by decisions dated May 6 and July 30, 2009, and March 23 and April 23, 2010. By decision dated December 17, 2010, OWCP affirmed the termination, but directed additional medical development. Following such development, it reinstated appellant's case on the periodic rolls retroactive to October 28, 2008.

Appellant relocated from Missouri to Florida in late June 2011. He remained under medical treatment.[5]

On July 18, 2012 OWCP obtained a second opinion from Dr. William Dinenberg, a Board-certified orthopedic surgeon. Dr. Dinenberg reviewed the medical record and a statement of accepted facts. On examination, he noted negative straight leg raising tests bilaterally, normal strength in both lower extremities, limited lumbar motion, and a normal gait. Dr. Dinenberg opined that the accepted injuries had resolved, and that appellant could return to restricted duty. In an August 13, 2012 supplemental report, he added a diagnosis of postlaminectomy syndrome. Dr. Dinenberg recommended a work-hardening program.

In an August 21, 2012 report, Dr. Mark R. Jones, an attending osteopath Board-certified in family practice, opined that appellant was "both physically and psychologically ready to return to work as a paramedic with no restrictions."[6]

As appellant's physician and the second opinion specialist both opined that appellant could work, OWCP referred appellant for vocational rehabilitation services on September 13, 2012. The vocational rehabilitation counselor noted on October 24, 2012 that appellant's Missouri paramedic license expired in 2009 and Florida did not offer reciprocity. Appellant expressed interest in returning to work as a paramedic, but in a warm climate, as cold temperatures aggravated his back pain.

A December 20, 2012 functional capacity evaluation demonstrated that appellant could perform work at a very heavy physical demand level, meeting "the physical demand requirements of a Paramedic," including lifting up to 100 pounds. Testing was performed in an environment of 76 degrees Fahrenheit.

On review of the functional capacity evaluation, Dr. Dinenberg opined on February 18, 2013 that it was uncertain if appellant could work in a cold weather environment, but that he had no other physical limitations. However, as appellant had not worked for five years, Dr. Dinenberg directed that appellant limit his schedule to four hours a day for several weeks, progressing gradually to an eight-hour workday.

In a May 25, 2013 letter, appellant advised the vocational rehabilitation counselor that he would not accept a job in a cold weather environment.

On June 21, 2013 the employing establishment advised the vocational rehabilitation counselor that it could not offer appellant a paramedic position as a job category reclassification would result in a prohibited promotion. Instead, on July 29, 2013 the employing establishment offered appellant a job as an office automation clerk at his former duty station in Missouri. The position entailed sedentary clerical work, carrying items weighing less than 10 pounds, walking, bending, and standing.

[5] A January 23, 2012 lumbar computerized tomography (CT) scan showed a stable L5-S1 fusion, and foraminal stenosis from L3 to S1. An April 11, 2012 lumbar myelogram showed impingement of the L5-S1 nerve roots bilaterally, left greater than right, and postoperative changes.

[6] Appellant participated in physical therapy from October to December 2012.

Appellant declined the job on August 4, 2013, contending that he needed additional lumbar surgery, and could not work or reside in a cold weather environment. He provided a July 11, 2013 report from Dr. James B. Billys, an attending Board-certified orthopedic surgeon, recommending hardware removal due to pedicle screw impingement on the left L4-5 facet.[7]

In an August 21, 2013 letter, OWCP advised the employing establishment that the office automation clerk job offer was not suitable work as it was "for a site outside of [appellant's] residential area, and we have not received any documentation to support that [the employing establishment] first searched for suitable employment in [appellant's] geographic area before it settled for a position outside of it."

In a September 3, 2013 memorandum, the employing establishment advised OWCP that it contacted several employing establishment agencies in appellant's geographic area regarding the availability of paramedic positions. Four agencies responded, two in Florida and two in Georgia. None had available paramedic positions.

Dr. Billys noted on November 19, 2013 that appellant had undergone a revision of his spinal cord stimulator. He recommended a foraminotomy and removing the L5-S1 fixation hardware on the right.

On January 17, 2014 OWCP obtained a second opinion from Dr. Fanourios I. Ferderigos, a Board-certified orthopedic surgeon, regarding the need for additional surgery and to determine appellant's work capacity. Dr. Ferderigos reviewed the medical record and statement of accepted facts. He obtained x-rays which he opined demonstrated no loosening or breakage of the L5-S1 fixation hardware. On examination, Dr. Ferderigos observed restricted lumbar motion, bilaterally negative straight leg raising tests, and no antalgic gait. He opined that the accepted injuries had resolved and that appellant did not have postlaminectomy syndrome. No additional surgery was indicated. Dr. Ferderigos opined that appellant was able to return to work as a paramedic, although the functional capacity evaluation did not indicate if appellant could perform under extreme weather conditions. He limited appellant to lifting, pulling, and pushing 50 pounds, less than the 75- to 100-pound lifting requirement for the paramedic position.

In a February 25, 2014 letter, OWCP advised appellant that the offered office automation clerk position was suitable work, and of the penalty provisions under FECA for refusing an offer of suitable work. It noted that the position was within the restrictions prescribed by Dr. Ferderigos. OWCP also explained that appellant's unwillingness to relocate was not a valid reason for refusal as the employing establishment confirmed on September 3, 2013 that "no suitable work [was] available in [his] current commuting area." It allowed appellant 30 days to accept the position without penalty. The employing establishment confirmed that the job remained open and available.

In a March 20, 2014 letter, appellant, through counsel, contended that Dr. Ferderigos was not competent to offer a neurologic opinion. OWCP responded by April 15, 2014 letter,

[7] On September 4, 2013 an OWCP medical adviser reviewed the medical record and opined that the proposed hardware removal was unlikely to be successful, as the previous four lumbar surgeries did not improve appellant's condition.

explaining that Dr. Ferderigos' opinion was sufficient to establish the offered position as suitable work. Also, the 50-pound lifting restriction imposed by Dr. Ferderigos, and appellant's contentions regarding adverse weather conditions, precluded his employment as a paramedic. Appellant was afforded 15 days to accept the office automation clerk position or face termination of his wage-loss compensation and schedule award eligibility.

Appellant then submitted an April 24, 2014 report from Dr. Jones, noting that appellant had not required opiate pain medication since moving to Florida, and should "live and work in a warmer climate for medical purposes."[8]

OWCP extended the May 1, 2014 deadline to May 16, 2014 due to a clerical error in forwarding appellant's attorney a copy of the case record. The employing establishment confirmed on May 1, 2014 that the office automation clerk position in Missouri remained open and available.

In a May 7, 2014 letter, appellant, through counsel, contended that the offered position remained unsuitable, as there were no current records showing that work as unavailable in appellant's commuting area. On May 12, 2014 she requested selection of an impartial specialist to resolve a conflict of medical opinion between Dr. Ferderigos and appellant's physicians regarding his work capacity and the need for additional surgery.

By decision dated May 29, 2014, OWCP terminated appellant's wage-loss compensation benefits and schedule award eligibility effective May 31, 2014 under section 8106(c)(2) of FECA, finding that he refused an offer of suitable work. It found that his relocation was not a valid reason for refusing the offer, as the employing establishment had confirmed on September 3, 2013 that there were no positions available in his current commuting area.

In February 13 and 17, 2015 letters, appellant, through counsel, requested reconsideration. She contended that Dr. Ferderigos' opinion was too vague and equivocal to represent the weight of the medical evidence, and that appellant's physicians indicated that appellant should not work in a cold environment. Appellant submitted December 17, 2014 and February 4, 2015 reports from Dr. Jones, noting that appellant functioned "much better in the warmer climate" due to reduction of pain symptoms.

By decision dated March 13, 2015, OWCP affirmed the May 29, 2014 decision, finding that the additional evidence submitted was insufficient to outweigh or create a conflict with Dr. Ferderigos' opinion, or otherwise establish that the offered position was not suitable work.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable,

[8] Counsel also provided a June 7, 2011 slip from Dr. Jones noting that appellant should "move to a warmer climate for medicinal purposes."

that appellant was informed of the consequences of his refusal to accept such employment and that he was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[9] Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation."[10]

OWCP regulations provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee, include the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[11] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.

If possible, the employing establishment should offer suitable employment in the location where the employee currently resides. If this is not practical, it may offer suitable reemployment at the employee's former duty station or other location.[12]

Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[13] Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[14] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[15]

[9] *See Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*. 42 ECAB 484, 488 (1991), *reaff'd on recon*., 43 ECAB 818, 824(1992). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (The claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

[10] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[11] *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[12] 20 C.F.R. § 10.508. *See also S.H.*, Docket No. 15-329 (issued June 5, 2015).

[13] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[14] 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

[15] *Id.* at § 10.516.

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain and recurrent L5-S1 disc herniation, necessitating 2008 and 2009 surgeries, and implantation and revision of a spinal cord stimulator. Appellant relocated from Missouri to Florida in 2011. In 2012, Dr. Jones, an attending osteopath Board-certified in family practice, and Dr. Dinenberg, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant could return to work in his date-of-injury position as a paramedic. OWCP then referred appellant for vocational rehabilitation. Appellant expressed interest in returning to work as a paramedic, but only in a warm weather environment.

The employing establishment offered appellant an office automation clerk position at his former duty station in Missouri. The job was sedentary, with lifting less than 10 pounds. Appellant declined the offer because he did not wish to return to a cold weather environment, and he asserted his lumbar condition had worsened. In September 2013 the employing establishment contacted federal agencies in Florida and Georgia, and determined that there were no paramedic positions available. OWCP then obtained a second opinion from Dr. Ferderigos, a Board-certified orthopedic surgeon, who imposed a 50-pound lifting restriction that precluded appellant from working as a paramedic.

OWCP advised appellant of FECA's penalty provision for refusing suitable work. Appellant continued his refusal, contending that the employing establishment failed to document that office automation clerk positions were unavailable in his current commuting area. OWCP terminated appellant's wage-loss compensation benefits and schedule award eligibility effective May 31, 2014, finding that the employing establishment documented on September 3, 2013 that there were no paramedic positions available in his current commuting area. Following submission of additional medical evidence, OWCP affirmed the termination on March 13, 2015.

The Board finds that the offered office automation clerk position was within the medical restrictions provided by Dr. Ferderigos. It was therefore medically suitable work, but it also required appellant to relocate from Florida to his former duty station in Missouri.

As stated above, if the job offer is for a site outside of the claimant's residential area, the employing establishment must document that it first searched for suitable employment in the claimant's current geographic area.[16] In this case, the employing establishment determined that as of September 3, 2013, there were no paramedic positions available in appellant's commuting area, including Florida and Georgia. However, this search was for the wrong job. The suitable employment position was as an office automation clerk, not a paramedic. There is no evidence of record that the employing establishment searched for office automation clerk positions in appellant's commuting area.

Accordingly, the Board finds that the offered position was not suitable. The employing establishment did not conduct the required search in appellant's current commuting area. It searched for an entirely different job. OWCP thus failed to meet its burden to justify imposing

[16] Federal (FECA) Procedure Manual, Part 2 -- Claim, *Job Offer and Return to Work*, Chapter 2.814.4(a)(2) (June 2013).

the penalty under 5 U.S.C. § 8106(c)(2). The Board will, therefore, reverse OWCP's March 13, 2015 decision.

On appeal, counsel asserts that OWCP did not document any attempt to find appellant employment in a warm climate or in his commuting area as required under 20 C.F.R. § 10.500(b), as recommended by attending physicians and the second opinion physician. As stated above, OWCP improperly failed to perform a current and proper search for suitable employment in appellant's geographic area. The March 13, 2015 decision must therefore be reversed.

Counsel also contended that OWCP's reliance on Dr. Ferderigos' opinion was a violation of due process and elementary fairness, because his opinion was vague, contradictory, and in clear conflict with those of appellant's physicians.[17] She also alleged that OWCP engaged in "doctor shopping" to "secure a medical opinion that will justify a termination of his benefits even while a conflict of medical opinion remains in his case."[18] The Board notes that as the termination must be reversed, these contentions are moot.

CONCLUSION

The Board finds that appellant did not refuse an offer of suitable work. OWCP did not establish that the work offered to and refused by him was suitable. Although the weight of the medical opinion evidence established the position's medical suitability, the evidence failed to establish that the employing establishment conducted any current search for suitable employment in appellant's geographic area.

[17] Counsel cited to *P.P.*, Docket No. 12-970 (issued November 6, 2012).

[18] Counsel cited to *William C. Iadipaolog*, 39 ECAB 530 (1988), and *Warren E. Armbruster*, 39 ECAB 132 (1987).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2015 is reversed.

Issued: August 23, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board